Office - Supr... U.S.
FILED
JAN 20 1983
ALEXANDER L. STEVAS,
CLERK

82-1241

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

CAUSE NO. 83-_____

E. WAYNE PINCKARD, et al,
Petitioners

v.

KENNETH R. PINCKARD,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF TEXAS

EDMUND L. COGBURN
DOW, COGBURN & FRIEDMAN
2300 Coastal Tower
Nine Greenway Plaza
Houston, Texas 77046
(713) 626-5870

Attorneys for Petitioners

Alpha Law Brief Co., Inc.—5606 Parkersburg—Houston, Texas 77036—223-3003

QUESTIONS PRESENTED

1. Is an injunctive order, enjoining Petitioners from divulging any information regarding the personal deportment of Respondent, except to certain persons, a violation of the Constitutional Rights of Petitioners under the Fourteenth Amendment to the United States Constitution, as an obvious previous restraint against freedom of speech?

2. Is an injunctive order, which enjoined Petitioners from divulging any information regarding the personal deportment of Respondent, except to certain persons, a violation of Petitioner's Constitutional rights under the Fourteenth Amendment to the United States Constitution where such order has neither pleading nor evidence from the record to support it?

3. Is an injunctive order, which enjoined Petitioners from divulging any information regarding the personal deportment of Respondent, except to certain persons, a violation of Petitioner's Constitutional rights under the Fourteenth Amendment to the United States Constitution where no showing or attempted showing was made regarding a clear and present danger to the administration of justice?

Petitioners submit that each of these questions should be answered in the affirmative.

SUBJECT INDEX

	Page
QUESTIONS PRESENTED	1
OPINIONS BELOW	2
JURISDICTION	2
STATUTORY PROVISIONS INVOLVED	3
STATEMENT OF THE CASE	3
REASONS FOR GRANTING WRIT	6
CONCLUSION	6
CERTIFICATE OF SERVICE	8
EXHIBIT A (Opinion filed March 25, 1982)	A-1
EXHIBIT B (Motion for Rehearing Overruled October 27, 1982)	B-1
EXHIBIT C (Portions of Brief for Petitioner in Texas Supreme Court)	C-1

LIST OF AUTHORITIES

CASES

	Page
Craig v. Harvey, 331 U.S. 367, 91 L.Ed. 1546 (1946)	5
Gulf Oil v. Bernard, 452 U.S. 89, 68 L.Ed. 693 (1981)	5
Near v. Minnesota, 283 U.S. 697 (1931)	5
Vance v. Universal Amusement Co., 445 U.S. 308, 63 L.Ed. 413 (1979)	5

UNITED STATES CONSTITUTION

First Amendment	5, 6
Fourteenth Amendment	5, 6

UNITED STATES STATUTES

28 U.S.C. § 1257(3)	2
28 U.S.C. § 2101(c)	2

TEXAS CIVIL STATUTES

Article 4642	3

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

CAUSE NO. 83-_____

E. WAYNE PINCKARD, et al,
Petitioners

v.

KENNETH R. PINCKARD,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF TEXAS

The Petitioners herein[1] respectfully pray that a Writ of Certiorari issue to review the opinion and decree of the Supreme Court of Texas, entered in this proceeding by the overruling of Petitioner's Motion for Re-Hearing of the Order of the Supreme Court dismissing Petitioner's Application for Writ of Error (Cause No. C-1293 in the

1. Petitioners herein are E. Wayne Pinckard, PBI Houston, Inc. (formerly Pinckard Brothers Interests, Inc.), W. Howard Smith, The Bradford Group, Inc., Gene Phillips and SYNTEX Corporation. The Respondent is Kenneth R. Pinckard, brother of E. Wayne Pinckard, The underlying controversy deals with control and operation of PBI Houston, Inc., a closely held corporation involved in the development of commercial real estate.

Supreme Court of Texas), for want of jurisdiction, such Motion for Re-Hearing being overruled on the 27th day of October, 1982.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fourteenth Supreme Judicial District of Texas (reviewing the lower courts ruling in this case) not reported, appears as Exhibit "A". The order of October 27, 1982 ("Order"), of the Supreme Court of Texas, unreported, acted to overrule Petitioners' Application for Writ of Error to the Court of Appeals for the Fourteenth Supreme Judicial District of Texas, dismissed by the Texas Supreme Court for want of jurisdiction. Exhibit "B" is a letter from the Clerk of the Texas Supreme Court, notifying Petitioners of entry of the Order. Exhibit "C" is an excerpt from Appellants' Brief filed in the Fourteenth Court of Appeals of Texas, by Petitioners, demonstrating the Constitutional argument raised by Petitioners at their first opportunity, which came after entry of the trial court's order.

JURISDICTION

The Order, overruling Motion for Rehearing, entered by the Supreme Court of Texas was dated October 27, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3), since Petitioners seek Writ of Certiorari based on the right to freedom of speech claimed under the Constitution of the United States. The Order, under 28 U.S.C. 2101(c), from which Petitioners seek review, is, therefore, entered timely for this Petition to be filed.

STATUTORY PROVISIONS INVOLVED

Art. 4642, Texas Civil Statutes (The Texas Injunction Statute):

"Article 4642. 4643, 2989 Grounds for

Judges of the district and county courts shall, in term time or vacation, hear and determine applications for and may grant writs of injunction returnable to said courts in the following cases:

1. Where the applicant is entitled to the relief demanded and such relief or any part thereof requires the restraint of some act prejudicial to him.

2. Where a party does some act respecting the subject of pending litigation or threatens or is about to do some act or is procuring or suffering the same to be done in violation of the rights of the applicant when said act would tend to render judgment ineffectual.

3. Where the applicant shows himself entitled thereto under the principles of equity, and the provisions of the statutes of this State relating to the granting of injunctions.

4. Where a cloud would be put on the title of real estate being sold under an execution against a party having no interest in such real estate subject to the execution at the time of the sale, or irreparable injury to real estate or personal property is threatened, irrespective of any legal remedy at law. Acts 1907, p. 206; Acts 1909, p. 354; Const., Art 5, secs. 8, 16."

STATEMENT OF THE CASE

This petition arises from an appeal from the issuance of an (interlocutory) injunctive order in Cause No. 80-52038, signed by the 189th District Court of Harris

County, Texas, on September 16, 1981, which in its turn, modified an original order granting a temporary injunction. The modifying order, while curtailing the rights of the Respondent under the original injunction, contained new matter, which included a specific prohibition upon Petitioners, Defendants therein, from divulging any information regarding the personal deportment of Kenneth R. Pinckard, Respondent, except that such information concerning such personal deportment was permissible to be divulged to the parents of Kenneth R. Pinckard, who were likewise, the parents of E. Wayne Pinckard, one of the Petitioners.

This portion of the Trial Court's order is, baldly, a capricious ruling. Respondent did not seek in his pleading for this relief. There is no evidence of any kind, testimonial or documentary, that suggests that this relief is appropriate to any injury or danger in which Respondent could be. There is no testimony that any of the Petitioners had, in any way disclosed "personal deportment" of Kenneth R. Pinckard to anyone. There is no testimony in the record as to any "personal deportment" of which Respondent would request the Court to prevent revelation.

The order of the trial court uses the terminology of "personal deportment", which is vague, indefinite and uncertain. There is no way to identify the behavioral patterns of Respondent which could properly be classified as "deportment".

Although it is difficult to really determine what the trial court had in mind, the order was probably intended to be a "gag" order similar to those sometimes used in criminal cases to avoid prejudicial publicity ("Fair Trial" vs. "Free Speech"). This is not a criminal case, there was

no showing of any kind that the rights of Respondent to a fair trial were threatened by any sort of divulgence of information as to his "deportment", and, as a result, the rights of Petitioners under the Fourteenth Amendment to the United States Constitution, which incorporates the First Amendment rights of freedom of speech, are seriously abused by this order. *Craig v. Harvey,* 331 U.S. 367, 91 L.Ed. 1546 (1946), Syll. 1; *Gulf Oil v. Bernard,* 452 U.S. 89, 68 L.Ed. 693 (1981) Syll. 7.

This is clearly a prior restraint on protected speech, the type of judicial action which was explicitly proscribed by *Near v. Minnesota,* 283 U.S. 697 (1931); *Vance v. Universal Amusement Co.,* 445 U.S. 308, 63 L.Ed. 413 (1979) Sylls. 1, 3a, 3b, and 4.

Petitioners, therefore, submit to this Honorable Court that this segment of the order is totally unsupportable, whether by constitutional policy, by pleading or by evidence, and especially in view of its fundamental conflict with the United States Constitution. (It conflicts with the Texas Constitution as well.)

The Constitutional issue was raised by Appellants' Brief, filed by Petitioners in Cause No. C-2960, Fourteenth Court of Appeals of Texas (see Exhibit "C" hereto). It has been pursued at each step since then, through Motion for Rehearing in the Fourteenth Court of Appeals, Application for Writ of Error to the Supreme Court of Texas and Motion for Rehearing in the Supreme Court of Texas. Before entry of the trial court's order, no constitutional issue existed, since there was neither pleading nor evidence in the record suggesting a plea for the injunctive relief from which Petitioners appealed.

REASONS FOR GRANTING WRIT

1. The Constitutional protections of the Fourteenth Amendment, incorporating the First Amendment to the United States Constitution, require that Petitioners be permitted their rights of freedom of speech without previous restraint.

2. The Constitutional rights of Petitioners under the Fourteenth Amendment to the United States Constitution, incorporating the First Amendment, with its guarantees of freedom of speech, require at a bare minimum that before freedom of speech is infringed there must be some pleading or evidence submitted to a trial court tribunal as a predicate for granting injunctive relief curtailing such freedom.

3. There was no showing or attempted showing in the trial court that the injunction involved was necessary to protect the impartial administration of justice from a "clear and present danger" thereto.

Petitioners urge this Court to accept this Petition for Writ of Certiorari and correct this improper infringement on the fundamental constitutional rights of Petitioners to freedom of speech.

CONCLUSION

For all the reasons set forth above, a Writ of Certiorari should issue to review the opinion and judgment of the Supreme Court of Texas in refusing jurisdiction of the judgment of the Court of Appeals for the Fourteenth Supreme Judicial District of Texas which, in turn, erroneously affirmed the injunctive order of the trial court in-

fringing the constitutionally guaranteed rights of freedom of speech of Petitioners.

DATED: January 19, 1983.

Respectfully submitted,

DOW, COGBURN & FRIEDMAN
2300 Coastal Tower
Nine Greenway Plaza
Houston, Texas 77046
(713) 626-5870

By: Original Signed By
EDMUND L. COGBURN
EDMUND L. COGBURN
Attorneys for Petitioners

CERTIFICATE OF SERVICE

I, Edmund L. Cogburn, hereby certify that, on the 19th day of January, 1983, the Petition for Writ of Certiorari to the Supreme Court of the State of Texas was served on Michael T. Powell of Brill, Brooks, Powell & Yount, attorney-of-record for Respondent, at his address at 601 Jefferson, Suite 1060, Houston, Texas 77002, by mailing it to him, by certified United States mail, postage prepaid.

Original Signed By
EDMUND L. COGBURN

EDMUND L. COGBURN

EXHIBIT A

Affirmed, and Opinion filed March 25, 1982.

NO. C-2960

E. WAYNE PINCKARD, et al, Appellant

v.

KENNETH R. PINCKARD, Appellee

Appeal from the 189th District Court
Harris County
Cause No. 80-52038

This is an appeal from an order modifying and continuing a temporary injunction. Sixteen points of error are presented for consideration. We affirm.

The appellant seeks to obtain relief on points one through fourteen and point sixteen "because there is no evidence justifying it, and it was an abuse of discretion to grant it." Point fifteen is also based on abuse of discretion but for the reason that the appellee came to equity with unclean hands.

The key words are "abuse of discretion." The rule concerning the standard of review in an appellate court of an order granting or denying a temporary injunction is well settled. The appellate court is strictly limited to a determination of whether there has been a clear abuse of discretion by the trial court. *Davis v. Huey,* 571 S.W.

2d 859 (Tex. 1978); *State v. Southwestern Bell Telephone Co.*, 526 S.W.2d 526 (Tex. 1975). Upon review of the record there is adequate evidence to support the trial court's order. This being a temporary injunction, there is no need to concern this opinion with the merits.

/s/ JIMMY JAMES
Associate Justice

Affirmed, and Opinion filed March 25, 1982.

Panel consists of Associate Justices Miller, Morse and James.

No Publication—TEX. R. CIV. P. 452.

EXHIBIT B

THE SUPREME COURT OF TEXAS
P. O. BOX 12248 CAPITOL STATION
AUSTIN, TEXAS 78711

October 27, 1982

Mr. Edmund L. Cogburn, Attorney
Nine Greenway Plaza
2300 Coastal Tower
Houston, Texas 77046

Mr. Bruce M. Partain, Attorney
7763 San Felipe - Suite 103
Houston, Texas 77063

Mr. Michael T. Powell, Attorney
601 Jefferson - Suite 1060
Houston, Texas 77002

Dear Sirs:

The motion for rehearing in the case of E. WAYNE PINCKARD ET AL. vs. KENNETH R. PINCKARD, No. C-1293 was this day overruled. Motion to amend granted.

Very truly yours,

/s/ GARSON R. JACKSON
Garson R. Jackson, Clerk

EXHIBIT C

Appellants submit that good faith has been sorely lacking in Ken's behavior at every stage of the transactions involved in this suit. His hands are clearly unclean and he does not deserve relief from a court of equity.

POINTS OF ERROR 5, 12 AND 14 RESTATED

Point No. 5

The Order found that the privacy of Plaintiff has been invaded and a Temporary Injunction was necessary to protect Plaintiff. This finding was in error because there was no evidence to support it.

Point No. 12

The Order enjoins Appellants from conducting surreptitious surveillance of Appellee or friends or relatives of Appellee and from examining or acquiring any document discarded by Appellee. This part of the Order is in error because there is no evidence to justify it, and it was an abuse of discretion to grant it.

Point No. 14

The Order enjoins Appellants from divulging any any information regarding the personal deportment of Appellee, except to Appellee's parents. This part of the Order is in error because there is no evidence justifying it, and it was an abuse of discretion to grant it.

STATEMENT, ARGUMENT AND AUTHORITY UNDER POINTS 5, 12, AND 14

These Points are grouped because they involve the privacy issue as asserted by Ken. There was a finding by the trial court that privacy of Ken had been invaded and he was awarded injunctive relief against "surveillance" and, additionally, Defendants were ordered not to discuss Ken's "personal deportment" except that Wayne was permitted to discuss the matter with Wayne's parents. This part of the Order is an enigma for more than one reason.

THERE IS NO BASIS FOR PRIVACY RELIEF

With respect to the issue of privacy, the only evidence heard by the Court that had any bearing on the issue of privacy was testimony that Wayne employed private investigators to procure information about Ken. There is no evidence that these investigators did anything except check out certain items of information and retrieve various items from the trash discarded by Ken's office. There is no testimony that they "shadowed" him or anyone connected with him. There is no testimony that they committed any kind of a trespass or did anything, in anyway, illegal. Under such circumstances injunctive relief against "surveillance" does not even have a pseudo-basis for support.

In a larger context, it would be hard to support the position that injunction would be proper to dissuade investigation of Ken and his activities. The videotapes reflect a lawless intent to steal the documents of PBI. The actual effect of the investigation was to turn up files of PBI which had been retained by Ken on one pretext

or another and ultimately discarded in Ken's trash. Certainly the fruit of the investigation justified the suspicions that gave rise to it.

THERE IS NO BASIS FOR A "GAG ORDER"

With respect to Ken's "personal deportment" there is no testimony in the record that even touches on that phase of the Order. The Order itself, by using the terminology of "personal deportment" is vague, indefinite, and uncertain. It would be unclear as to what behavioral pattern of Ken would be classified as "deportment".

For example, would the acts of Ken Pinckard in stealing documents from the PBI be "personal deportment" subject to the injunctive ban? Would his appropriation of the "Pinckard" name be "personal deportment"? As a logical absurdity, even the writing of this brief on behalf of Appellants could be well categorized as falling within the injunctive prohibition of the Order.

Possibly the Court regarded this as a "gag" order similar to those sometimes used in criminal cases. In those cases, of course, the Court has the problem of reconciling the First Amendment rights of individuals to speak out and discuss with the Sixth Amendment right to a fair trial. While the resolutions of these issues are still unclear as a matter of constitutional law, it is safe to say that the clash between the First and Sixth Amendment (as incorporated in the Fourteenth Amendment to the United States Constitution), is not present in a civil case where fundamental protections for the criminal accused are not involved.

The Court's Order is, undoubtedly, a prior restraint on protected speech, falling under the ban of *Near v.*

Minnesota, 283 U.S. 697 (1931) as well as Section 8 of the Bill of Rights of the Texas Constitution. It could not be permitted to stand even if supported by pleading and evidence, which it is not. *Dallas General Drivers, Etc. v. Wamix, Inc. of Dallas*, 295 S.W.2d 873 (Tex., 1956) Syll. 9; *Ex Parte Tucker*, 220 S.W. 75 (Tex., 1920); *Dallas Oil & Gas, Inc. v. Mouer*, 533 S.W.2d 70 (Tex. Civ. App.—Dallas, 1976, no writ), Syll. 2; *Amalgamated Meat Cut. v. Carl's Meat & Provision Co.*, 475 S.W.2d 30 (Tex. Civ. App.—Beaumont, 1971, writ dism'd) Sylls. 3, 4 & 5.

Appellants submit, therefore, that the privacy issue was not fully raised either by pleading or by evidence and, regardless, that the relief granted thereon by the Order is inappropriate under any circumstances.